

IN THE SUPREME COURT OF CALIFORNIA

Case No. _____

PETER PATERNO, et al.,

Plaintiffs-Appellants

v.

STATE OF CALIFORNIA, et al.,

Defendants-Respondents

After A Published Decision by the California Court of Appeal,
Third Appellate District, No. C040553

Judicial Council Coordination Proceeding No. 2104
Honorable John J. Golden, Presiding Judge

PETITION FOR REVIEW

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QUESTIONS PRESENTED

In *Belair v. Riverside County Flood Control District* (1988) 47 Cal. 3d 550, so as to not unduly deter the building of beneficial flood control projects, this Court held that inverse condemnation requires proof that the overall design, construction, operation and maintenance of a flood control project posed an unreasonable risk of harm to plaintiffs, and that unreasonable design, construction, operation and maintenance substantially caused their damage. (*Id.* at 565; and see, *Bunch v. Coachella Valley Water District* (1997) 15 Cal. 4th 432, 450.) To apply this Court's special liability standard, the trial court must examine conduct of the public entity manifested by its policies or "plans" officially adopted, and not negligence of its employees in carrying out those policies or plans. (*Paterno v. State of California* (1999) 74 Cal. App. 4th 68, 80-81, hereinafter "*Paterno I*" [requiring a new trial of the takings claim because the *sine qua non* of liability is the adoption by a public agency of a "plan", a deliberate act of the government body].)

Although Defendant and Petitioner State of California ("the State") won at re-trial, the court below reversed with directions to enter judgment for Plaintiffs and Respondents (hereinafter "Respondents") for inverse condemnation arising from the failure of the "Linda levee" to perform as intended on February 20, 1986. The court below overlooked the binding precedent of *Belair* and *Bunch* imposing liability without evaluating overall design, construction, operation and maintenance of Linda levee for inherent risk, causation and reasonableness.

The court below also usurped the fact finding role of the trial court and failed to apply established rules for review of a trial court's findings of fact. It construed the trial court's findings to mean that Linda levee's design and

construction caused its failure, a cause that the trial court considered and expressly rejected.

To promote uniformity of decision, this Court should intervene to review the important questions of law set forth below.

1. Whether the court below failed to apply the binding precedent articulated in *Belair* and *Bunch* by basing the State's liability solely upon Linda levee's design and construction, rather than upon the overall project plan for design, construction, operation and maintenance of the flood control works of the Sacramento River Flood Control Project, including Linda levee.

2. Whether the court below usurped the fact finding role of the trial court in attributing the failure of Linda levee to a cause that the trial court rejected, and failed to apply established rules of law in support of the judgment.

WHY REVIEW SHOULD BE GRANTED

This case presents questions of far-reaching importance to all public entities involved in California flood control projects, including the Sacramento River Flood Control Project (hereinafter "SRFCP"), and the State's taxpayers. Aside from the un-liquidated damage of \$95 million estimated in 1986 (See Pltf. Exh. 836A, Section 2.03, p. 2-2.), the effect the decision below will have on future flood cases, proposed flood control projects and land use planning is very significant.

The decision below presents a real threat to all public flood control agencies of debilitating liability that will most certainly discourage further construction or other involvement in flood control projects. The special liability standard that this Court fashioned in *Belair* and *Bunch* requires a broad inquiry into whether the flood control system as a whole poses an unreasonable risk of flooding that causes damage. The decision below

converts that broad inquiry into a narrow examination of whether one of the elements of the overall flood control plan is flawed, and to the exclusion of other project elements countering that flaw. By imposing liability without considering the reasonableness of overall design, construction, operation and maintenance of Linda levee, the project plan for that flood control improvement, the court below deviated from the precedent set in *Belair* and *Bunch*.

The project plan adopted by the State is comprised of design, construction, operation and maintenance elements that together constitute the project plan at Linda levee (hereinafter “the project plan”). Its elements together manifest the State’s efforts to control floods in the SRFCP in general and at Linda levee in particular. The “levee operation” element requires that Linda levee be continuously patrolled in flood times and that seepage or resulting sand boils be controlled by levee patrollers to prevent levee failure. (See Section I (B)(2), *infra*.)

The decision below treats Linda levee’s design and construction as if they were the only elements of the project plan which stood between Respondents and flood damage. (Slip Opinion attached hereto as Exhibit “A” (“SO”) 16, 18, 31, 32, 33, 36, 42, 45, 49.) The court below ignores the levee operation element of the project plan, one that Respondents conceded is adequate to offset risks of seepage failure arising from levee design/construction that might be less than optimum. (See Section I (B)(3), *infra*.)

During trial, Respondents withdrew their claims that the levee operation element of the system is unreasonably inadequate and caused the failure. By their deliberate act, Respondents did not carry their burden of proving that overall project plan for Linda levee posed an unreasonable risk of harm that substantially caused Linda levee’s failure.

The decision below sanctions an attack upon individual elements of a flood control plan to the exclusion of other relevant elements. It fails to recognize what is implicit in *Belair* and *Bunch*: that a risk of levee failure arising from one or more individual elements of a flood control plan may be countered by its other elements. By reversing without evaluating the levee operation component of the project plan for Linda levee, the court below sanctions a takings recovery without proof as required by *Belair* and *Bunch*. (See Section I (B)(1), *infra*.)

If allowed to stand, the decision below would materially reduce a flood control agency's ability to manage flood control projects by addressing foreseeable flood risks in a reasonable manner, including the use of one element of the project plan to offset flood risks arising from another. To allow flood control agencies to maintain a coherent policy toward flood control for the protection of existing and prospective California communities, this Court should intervene to restore the latitude that *Belair* and *Bunch* are intended to provide.

The court below also usurped the trial court's role as trier of fact and failed to apply established rules on review requiring that the trial court's findings of fact be construed to support its judgment. The trial court considered the two diverging mechanisms of levee failure presented at trial, expressly rejecting the very cause of failure that the court below concludes the trial court found was the cause. (See Section II, *infra*.) This important question of law directly implicates the need to ensure uniformity in the decisions of reviewing courts. That goal cannot be promoted if the court below and other reviewing courts may substitute their own conclusions in place of findings of fact reached by trial courts by considered evaluation of the evidence as it is presented.

BACKGROUND

A. FACTS

The “Linda levee” is a 3,000 foot section of levee that is part of the SRFCP, a flood control system consisting of more than 980 miles of flood control levees, 159 miles of weirs, pumping stations and other flood control facilities built by the United States, the State and local public agencies. (State’s Respondent Appendix (“RA”) 265, 266-268, Pltf. Exh. 177, pp2-4.) Built in 1905 by Yuba County as the “Morrison Grade”, Linda levee was among the many levee miles incorporated “as built” into what was later known as the SRFCP. (Statement of Decision, Appellants’ Appendix (“AA”) 303, 319-320.) The United States Corps of Engineers and the State raised and widened Linda in 1934 and again in 1940 pursuant to federal levee design standards. (*Id.* at 313-314.)

The flood of 1986 caused Linda levee to fail well below its design capacity. Before 1986, the levee successfully withstood all floods to which it was subjected. (*Id.* at 314.) The 1955 flood subjected it to a flood stage greater than its design stage without exposing deficiencies requiring repairs. (*Id.*; and see SO 8.) The 1964 flood subjected it to a flood stage greater than that to which it was exposed in 1986 without failure. (*Id.*) In spite of Respondents’ attempts to show otherwise, the trial court did not find that Linda levee ever suffered seepage or other distress before it failed. (See State’s Respondent’s Brief, Section II (C)(2)(1) for discussion.)

The State was exonerated from liability because, *inter alia*, the State’s efforts to prevent levee failure, as manifested by elements of the project plan for Linda levee that Respondents attacked, did not substantially cause Respondents’ damage. (AA 327, 330, 336.)

B. PROCEDURAL HISTORY

These coordinated actions were filed by more than 3,000 individuals and business entities suffering property damage resulting from Linda levee's failure on February 20, 1986. A six month trial in 1991 against the State and Reclamation District 784 resulted in a jury verdict in favor of the State and Reclamation District 784 on Respondents' claim for dangerous condition of public property. The trial court, however, held the State and Reclamation District 784 liable for inverse condemnation.

The takings judgment was based upon the State's failure to prevent Linda levee from failing by providing proper levee patrols, conducting a flood fight, and violating federal and state requirements for levee operation. (See *Paterno I, supra*, 74 Cal. App. 4th at 80-81.) All parties appealed.

In *Paterno I*, the court below affirmed the jury verdict on the dangerous condition of public property claim, and reversed and remanded for a new trial of the inverse condemnation claim. A new trial was necessary, in part, because the trial court conflated the defendants' acts properly manifested by their adopted policies or "plans" with the negligence of their employees in carrying out those policies or plans. (*Paterno, supra*, 74 Cal. App. 4th at 79.) Respondents' Petition for Review was denied.

In February 2001, the takings claim was re-tried. Respondents (plaintiffs below) contended that Linda levee failed by the seepage of floodwaters under and through the levee embankment, that the levee's location and construction rendered it susceptible to seepage. (AA 326-327.) Respondents urged that seepage control measures were available, feasible and if they were constructed, Linda levee would not have failed. (SO 9, 17, 18-19, 36-37, 47-50; and see AA 335-336.)

Respondents submitted evidence establishing the levee operation element of the project plan, requiring continuous levee patrolling, flood

fighting and control of seepage, sand boils and other levee distress during floods to prevent failure. (See Section I (B)(2), *infra.*) However, on the forty-second trial day they conceded that the levee operation element of the project plan for Linda levee was not proven to have substantially caused the failure or to be unreasonable. (See, Section I (B)(3), *infra.*) Because Respondents' withdrew those claims, the trial court made no findings or conclusions pertaining to the levee operation element.

After the four month trial, the trial court followed *Paterno I's* direction that the flood control policies or "plans" comprising the project plan be examined. (SO at 17; Statement of Decision, Appellants' Appendix ("AA"), 303, 327-328.) Although finding that Linda levee's design and construction rendered it *susceptible* to seepage failure, the trial court describes the physical process of hydro-consolidation as the cause of failure (*Id.* at 326), an unforeseeable flood risk before Linda levee failed. (See Section II (A), *infra.*) Having found that no element of the project plan attacked by Respondents substantially caused Linda levee's failure, the trial court did not balance the *Locklin* factors. (See AA 326-327, 329-330, 336, 337.) Respondents appealed.

Oral argument before the court below took place on November 19, 2003. The State argued, *inter alia*, that even if Linda levee's design and construction caused it to fail from seepage, Respondents did not carry their burden at trial of proving that the overall design, construction, operation and maintenance of Linda levee posed an unreasonable risk of harm that caused the damage.

On November 26, 2003, the court below affirmed the judgment for Reclamation District 784, reversed the judgment for the State and directed that on remand, judgment be entered for Respondents. (See Opinion attached hereto as Exhibit "A".) The reversal is grounded upon the court

below's failure to apply *Belair*, *Bunch* and their requirement that all relevant elements of the project plan be evaluated as a whole before liability may be imposed.

On December 11, 2003, the State timely filed its Petition for Rehearing asserting, *inter alia*, the substance of the questions presented to this Court. On December 24, 2003, the court below denied rehearing, making editorial modifications unrelated to the issues raised by the State's Petition for Rehearing or herein. (Exhibit "B" hereto.)

I.

THE COURT BELOW DEVIATES FROM BINDING PRECEDENT BY HOLDING THE STATE LIABLE BASED UPON THE LEVEE'S DESIGN AND CONSTRUCTION AND WITHOUT EVALUATING THE RELEVANT ELEMENTS OF THE PROJECT PLAN, INCLUDING ITS LEVEE OPERATION ELEMENT

The court below clearly erred in construing of the trial court's causation findings. (See Section II, *infra*.) However, assuming *arguendo* that its construction is correct, it failed to follow the binding precedent of *Belair* and *Bunch*. Those cases hold that liability may not be imposed without proof that the overall design, construction, operation and maintenance of a flood control project is unreasonable. By incorrectly excluding consideration of the levee operation element of the project plan for Linda levee, the court below improperly relieved Respondents of their burden of proof.

Respondents had to prove that based upon the totality of the State's conduct to prevent levee failure manifested by all relevant elements of project plan for Linda levee, they were exposed to an unreasonable risk of harm that substantially caused the levee failure. (See *Bunch*, *supra*, 15 Cal.4th at 450.) By withdrawing all claims that the levee operation element of the project plan is flawed, including levee patrolling and flood fighting,

Respondents did not carry their burden of proof.

This question of law is properly addressed here, and is of utmost significance to California taxpayers in general and to flood control agencies in particular.

A. THIS LEGAL ISSUE IS PROPERLY ADDRESSED BY THIS COURT

The trial court exonerated the State from liability because Linda levee's failure was not caused by its design and construction. The State's Respondent Brief in the court below addressed that issue, among others, fairly raised by Respondents.

At oral argument before the court below, the State contended that if the trial court's causation finding was rejected, Respondents did not prove at trial that the elements of project plan as a whole, including its subsidiary plan of levee operation, posed an unreasonable risk of harm substantially causing Linda levee's failure. (See Certified oral argument transcript attached to Petition for Rehearing, 26:20-27:22.) The State raised this question of law at the earliest practicable time based upon undisputed evidence. Review is proper.

Issues raised for the first time on appeal or rehearing are not normally considered. (See *Panopulos v. Maderis* (1956) 47 Cal. 2d 337, 341.) This rule does not apply, however, to a question of law raised by undisputed facts. (See *Hittle v. Santa Barbara County Employees Retirement Association* (1985) 39 Cal. 3d 374, 392, Fn. 10, and 397, [where this Court disagreed with the Court of Appeal's denial of rehearing on an issue of law raised for the first time on rehearing.]

As in *Hittle*, the State's contention presents a question of law on undisputed evidence. After undisputed evidence established that the project

plan includes a levee operation element to prevent Linda levee from failing, Respondents withdrew their claims that the levee operations element is causally connected to the levee failure or unreasonable. (See RT 7313:2-7320:19; and see Section I (B)(2), *infra*.)

The decision below does not apply the precedent established by *Belair* and *Bunch*. Although those cases require it, the court below did not consider all of the State's efforts to prevent levee failure to ascertain whether overall, the elements of the project plan of Linda levee posed an unreasonable risk of harm, and if so, whether that unreasonable design, construction, operation and maintenance substantially caused the damage. (See *Bunch*, *supra*, 15 Cal.4th at 450, citing *Belair*, *supra*, 47 Cal.3d at 565; and see Section I (B), *infra*.) As in *Lewis*, *supra*, review of this question of law should be granted.

B. BY NOT EVALUATING ALL OF THE STATE'S EFFORTS TO PROTECT RESPONDENTS FROM LEVEE FAILURE, THE COURT BELOW DID NOT APPLY *BELAIR* AND *BUNCH*

The court below recites that reversal is based upon the State's "global plans" and its inherent but incorrect assumption, in light of available information, that Linda levee met engineering standards. (SO 19.) The court below observes that the SRFCP plan is not "irrelevant to liability" simply because it incorporates subsidiary plans. (*Id.*) It notes that Linda levee's design and construction offered little resistance to seepage, and concludes that seepage caused its failure. (*Id.* at 16,18.) The court below concluded that seepage control measures were available, feasible alternatives that if

made part of the global or project of Linda levee, would have countered Linda levee's design and construction. (*Id.* at 36.)

Although referring to the State's "global plan" (*Id.* at 19, 47), the overall design, construction, operation and maintenance of Linda levee, the court below did not evaluate it for inherent risk, causation or reasonableness. The reversal rests solely upon the levee's design and construction. (*Id.* at 16-19, 31-33, 36-37, 40-42, 52.)

The State's global plan of flood control at Linda levee includes a levee operations element as well as design and construction elements. Levee patrolling, flood fighting and other aspects of the levee operations element protect against levee failure in flood periods. Nevertheless, liability is imposed without considering all relevant elements of the project plan, including the levee operation element that Respondents conceded is adequate. (See Section I (B)(3), *infra.*)

Although the trial court did not do so, the court below applied its own balance test to assess reasonableness. (SO 34-43.) By ignoring the levee operation element of the project plan, the court below did not assess the reasonableness of the overall design, construction, operation and maintenance of Linda levee as *Belair* and *Bunch* require.

1. Liability Cannot Be Based Upon A Risk of Harm Arising From Elements of The Overall Design, Construction, Operation and Maintenance of Linda Levee, to the Exclusion of Other Elements Offsetting That Risk.

Recovery requires proof that the defendant acted unreasonably in the development of construction and operational plans so as to avoid unnecessary damage to private property. (See *Belair, supra*, 47 Cal.3d 550, 565.) A damaged landowner must prove that the defendant's conduct, as manifested by its plans for design, construction, operation and maintenance, posed an unreasonable risk of harm, and such unreasonable design,

construction, operation and maintenance substantially caused the damage. (*Bunch, supra*, 15 Cal. 4th at 450, [citing *Belair, supra*, 47 Cal. 3d at 565]; and see *Locklin v. City of Lafayette* (1994) 7 Cal. 4th 327,369, [public entity's efforts to prevent damage must be shown to be unreasonable in light of the potential for damage posed by the State's conduct]; and see *Paterno I, supra*, 74 Cal.App. 4th at 86, 90, [public entity's deliberate acts to prevent damage manifested by adopted plans or policies.]

This Court fashioned the special liability standard because “strict and ‘open-ended’ liability for the failure of a project **whose overall design, construction, operation and maintenance was ‘reasonable’** would unduly deter the development of these vital bulwarks against common disaster.” (*Emphasis Added*; See *Bunch, supra*, 15 Cal. 4th at 450.) As this Court stated in *Bunch*:

“When a **public flood control system** fails to protect land from historic periodic flooding, the only way to determine whether a damaged private landowner has thereby been forced to contribute a compensable ‘disproportionate’ share of the public undertaking is to determine whether **the system**, as designed, constructed, operated and maintained, exposed him to an unreasonable risk of harm, either individually or in relation to other landowners.” (*Emphasis Added*; See *Bunch, supra*, 15 Cal.4th at 450, citing *Belair, supra*, 47 Cal.3d at 565.)

Evaluation of the defendant's conduct in developing construction and operational plans “is not limited to a narrow examination whether the system's technical specifications, intended capacities, materials, workmanship, and repairs were adequate under all of the circumstances”. (*Id.* at 446, Fn. 3.) All of the defendant's efforts to prevent unnecessary damage to private property must be considered. (*Id.* and at 450.) This rule of law implicitly recognizes that a risk of harm inherent in one element of the overall design, construction, operation and maintenance of a flood

control project may be offset by its other elements.

The court below reversed based solely upon Linda levee's design and construction, ignoring the levee operation element of the State's project plan. By its departure from the teachings of *Belair* and *Bunch*, the decision below relieves Respondents, and those damaged by future floods, of their burden to prove that the *overall* design, construction, operation and maintenance of a project posed a risk of harm, that such risk caused damage, and is unreasonable. Moreover, by omission, that departure materially distorts the State's efforts to prevent unnecessary flood damage to Respondents.

To highlight one outcome-determinative flaw in the decision below, the court below asserts that seepage control measures at Linda levee were feasible alternatives, which, if built, would have countered the risk of failure inherent in its construction. (SO 16-17, 36.) **However, while focusing upon seepage control as a flood control element absent from the project plan at Linda levee, the court below ignores the levee operation element countering the levee's risk of seepage failure that is part of the project plan.**

The court below's narrow perspective severs elements of the State's integrated project plan and then evaluates them to the exclusion of other relevant elements. *Belair* and *Bunch* clearly do not support such an artificial analysis of the State's project plan to protect Respondents' from levee failure.

2. The Levee Operation Element of The Project Plan Protects Respondents from Levee Failure.

Undisputed evidence established levee operations as one of the elements of the State's project plan for Linda levee. The levee operation element counters risks posed by Linda levee's design and construction.

The State assured the United States that the SRFCP flood control works would be maintained and operated as required by the Secretary of the Army. (AA 323; State's Respondent's Appendix ("RA") 65,66.) In 1944, the United States issued 33 CFR section 208.10(b)(2) providing standards for operation of completed SRFCP flood control works, including continuous levee patrolling to control sand boils or seepage. (See RA 65,66; and see RA 124; RT 2494:25-2495:4.) In 1955, the United States Army Corps of Engineers issued a Standard Operation and Maintenance Manual for the SRFCP ("the Manual") providing, *inter alia*, further information regarding levee operations during flood periods. (See RA 188-241 at 193,195, 204, 217-220; and *see* RT 7771:24-7773:6.)

The State adopted these criteria. (RT 5747:3-14; 5813:2-18.) These levee operation procedures were in effect at Linda levee during the 1986 flood. (RT 5809:15-5813:18.) Nevertheless, the court below did not consider this levee operations element of the State's project plan and hence, imposed liability by materially deviating from *Belair* and *Bunch*.

3. There is No Proof That Overall, the State's Project Plan at Linda Levee Posed An Unreasonable Risk of Harm to Respondents, That It Substantially Caused The Levee Failure, or is Unreasonable.

During the State's case in chief, the trial court sustained Respondents' objection that evidence pertaining to the levee operations element of the State's project plan is not relevant. (RT 7313:2-19; 7315:24-7320:19.) Respondents maintained that no evidence admitted during their

case in chief connected a plan of flood fighting or levee operation to Linda levee's failure, or showed that it is unreasonable. (RT 7315:13-18)

Respondents specifically referred to their pleadings to show what element of the State's flood control system was abandoned. (RT 7320:6-11.)

Respondents had the burden to prove in the first instance that overall, the State's project plan for Linda levee, comprised of integrated elements of design, construction, operation and maintenance, posed an unreasonable risk of harm to them and that such unreasonable risk of harm caused their damage. The State had no burden to prove the contrary. Although the State argued that the levee operation element is part of the project plan for Linda levee, the State did not offer further evidence of it. (RT 7321:11-17, 7458:7-12, 7624-7-15; 9473:5-9477:15; 9477:20-9481:13; 9490:24-9493:24.)

The materiality of the levee operation element of the project plan is highlighted by the trial court's findings before *Paterno I*. The trial court signed a statement of decision which was a near verbatim copy of Respondent's proposal. (See *Paterno I, supra*, 74 Cal. App. 4th at p. 79.) Accordingly, the trial court concluded in 1991 that the State's failure to provide proper levee patrols, to conduct a flood fight and violation of federal and state requirements for levee operation caused the failure. (*Id.* at 80-81.) The trial judge in the first trial found that **"the evidence shows that the boils could have been detected by levee patrols operating under proper procedure and thus treated and ringed by a flood fight in time to prevent levee failure"**. (*Id.* at 81.) On retrial, Richard Meehan, Respondents' expert witness, testified that seepage and resulting sand boils caused Linda levee's failure. (See, RT 6135:21-6136:13; and see, Section II (A), *infra*.) He admitted, however, that had there been trained people and

equipment, Linda levee could have been saved. (RT 6328:6-17.)

Despite their judicial admission that Linda levee's failure would have been prevented had the levee operation element of the project plan been followed, Respondents abandoned any attack upon that element at re-trial. Although part of the project plan for Linda levee, Respondents and the court below ignored it.

Respondents did not prove that the levee operation component of the project plan is inadequate in itself, or that the overall project plan was inadequate because its levee operation element did not counter risks of failure inherent in Linda levee's design and construction. There is no proof that if the project plan posed a risk of harm to Respondents causally connected to Linda levee's failure, that the project plan as a whole is unreasonable.

Although *Belair* and *Bunch* require proof of those essential elements, the decision below supports recovery without that proof. Moreover, it severely limits the ability of flood control agencies to develop flood control projects by incorporating elements that *together* protect against unnecessary flood damage. This Court should intervene by reviewing the decision below, which threatens to substantially reduce the latitude this Court, by its holdings in *Belair* and *Bunch*, provided to flood control agencies so that construction of beneficial projects is not unduly deterred by debilitating liability.

II.

THE COURT BELOW USURPED THE TRIER OF FACT'S ROLE, AND FAILED TO APPLY ESTABLISHED RULES OF LAW IN SUPPORT OF THE JUDGMENT

The decision below recognizes that the parties dispute the meaning of the Statement of Decision, quotes from it extensively, and emphasizes “critical portions” with italics. (SO at 10-16.) Based upon two emphasized causation findings, the court below concludes that the trial court found that the initial poor construction of Linda levee caused a seepage failure (*Id.* at 2, 12, 14, 16), a cause that the trial court expressly rejected.¹

After acknowledging the State’s contention that no plan was found to have caused the failure is “superficially correct”, the court below rejects that contention based upon a “fair reading” of the Statement of Decision and its

¹ In conjunction with its misconstruction of the trial court’s causation findings, the court below incorrectly asserts that even if the unforeseeable risk of hydro-consolidation materialized by causing Linda levee’s failure, the State is not exonerated from liability. (SO 28-29; and see Section II (A), *supra*.) Citing Professor Arvo Van Alstyne, the unforeseeability of the risk is only informative in applying the balance test for reasonableness. (SA 28-29.) Although the principle of “foreseeability” is not the test for causation and is not meant in the sense of tort law, it is implicit in the risk assessment analysis adopted in flood control cases beginning with *Belair*. The principle recognizes that a defendant cannot deliberately shift a risk of harm inherent in its flood control policy that is not anticipated or anticipatable, known or knowable, predicted or predictable, when a policy is adopted. Accordingly, this Court directly rejected dissenting Justice Mosk’s proposal that a defendant may be liable for unforeseeable flood risk as strict liability and fundamentally inconsistent with the foresight perspective properly applied. (*Belair, supra*, 47 Cal.3d at 565, Fn. 6.) The court below’s *dictum* deviates from *Belair*’s holding, and can only be characterized as “chilling” to public entities with might otherwise participate in flood control projects.

own conclusion that Linda levee's initial construction is "abysmal". (*Id.* at 18.) By that action, the court below usurps the trial court's role to find the facts, substituting its own factual conclusions for those made by the trial court.

The trial court's finding of the cause of damage is one of historical fact binding on review if supported by substantial evidence. (See, *Goebel v. City of Santa Barbara* (2001) 92 Cal. App. 4th 549, 555-556; and see also *Ali v. City of Los Angeles* (1999) 77 Cal. App. 4th 246, 250.) This Court has given clear direction to the reviewing courts in construing findings of fact made by the trial court. (See *Johndrow v. Thomas* (1947) 31 Cal.2d 202, 208-209.) Specifically:

"Findings should be accorded a liberal construction, with a view to supporting, rather than defeating, the judgment...It is an established rule of law that the findings of fact are to receive such a construction as will uphold rather than defeat the judgment thereon. For this purpose they are to be liberally construed, and any ambiguity or inconsistency therein is to be resolved in favor of sustaining the judgment. If a finding is susceptible to two constructions, one of which is supported by the evidence and the other is not, the former is given. And whenever from facts found, other facts may be inferred which will support the judgment, such an inference will be deemed to have been made." (*Emphasis Added; See, Id.*)

Although a reviewing court will not inexorably reach the same conclusion on a cold record at the appellate stage that they might if any one of them had been sitting as the trial judge, appellate judges should defer to the judgment of trial judges who are 'on the scene'. (See *People v. Batts* (2003) 30 Cal.4th 660, 683.) If a reviewing court fails to defer to the findings of fact made by the trial court, this Court may reverse the judgment of the reviewing court. (*Id.*; and cf., *Shamblin v. Brattain* (1988) 44 Cal.3d

474, 479, [on review for abuse of discretion, reviewing court cannot substitute its judgment where two or more inferences reasonably deduced from conflicting evidence].)

When the trial court's critical causation findings are considered, including those emphasized by the court below, fundamental errors in construing them are apparent. The plain meaning of the causation findings and their structure within the Statement of Decision are ignored by the court below. Indeed, what it concludes the trial court found to be the cause of the levee failure is a cause that the trial court considered and expressly rejected: Linda's levee's failure to meet design standards. (SO 16, 19-20, 32, 36, 40.)

Instead, the trial court found that the levee failure was caused by the physical process of hydro-consolidation, a flood risk which the undisputed evidence shows was unknown, undiscoverable and unforeseeable before 1986. Substantial evidence supports that finding.

A. TWO MECHANISMS OF FAILURE WERE PRESENTED AT TRIAL

Two divergent mechanisms of levee failure were presented at trial. Respondents, through their expert Richard Meehan, asserted that Linda levee failed from seepage of flood waters due to its location, poorly constructed embankment, poorly constructed foundation, a buried irrigation pipe attracting seepage, rodent holes attracting seepage and the nearly Speckert gravel pit. (AA 327, 330-334; RT 6129:17-6130:8; 6136:22-6142:16; 6275:22-6276:16.) According to Respondents, flood waters seeping through the levee's embankment and foundation culminated in sand boils on its landward side that evacuated soil material from the foundation until the embankment collapsed into the resulting void. (RT 6135:21-6136:13; 6323:22-6325:12; 6326:4-12; 6326:23-6327:7.)

The State presented a different causation theory: that Linda levee failed from hydro-consolidation, a physical process involving the interaction of flood water with sub-layers of sand and overlying sub-layers of clay within Linda levee's foundation. (RT 8752:5-8757:4; 8923:12-8924:6; 8949:8-8950:3; 8964:13-8965:10; 8969:4-11; 8974:22-8975:7; 9051:11-9053:13.) This process occurred when floodwater saturated sand sub-layers, causing the sand particles to consolidate and leave small gaps between consolidated sands and overlying clay material. (*Id.*; RT 8754:18-8757:4; 8798:8-8801:2; 8959:8-8960:5; 9051:11-9053:13.) Hydro-consolidation provided floodwaters with open conduits for accelerated flow of floodwater through the levee's foundation. (*Id.*) Conduits did not close when flood waters receded in pre-1986 floods but instead, extended them closer to the levee's landward side as hydro-consolidation occurred with each successive flood event in the decades before the failure. (RT 8969:4-11; 8971:2-8973:13; 8978:19-8979:2; 9051:11-9053:13; 9057:23-9058:13.)

Substantially all materials allow water to flow through them. (RT 8571:20-8572:19.) Unlike seepage of flood waters, which expends its hydraulic energy to force its way through the same soil material during each flood event, hydro-consolidation and open conduits it created during prior flood events allowed returning flood waters to flow immediately through them without loss of hydraulic energy. (See AA 326, Para. 2; cf., RT 6148:24-6150:15; and cf., RT 8756:9-8757:4; 8798:18-8800:1; 8822:22-8824:10; 8923:19-8924:2; 8969:4-11; 8972:19-8973:19; 9053:1-13; 9057:23-9058:13.) And unlike seepage, by February 20, 1986, the cumulative effect of hydro-consolidation had progressed far enough into Linda levee's foundation to reach its landward side, culminating in a rapid, high-pressure failure by hydro-fracture. (See AA 326, Para. 2; RT 8801:4-8804:4; 8822:22-8824:10.) Hydro-consolidation was unknown as a flood

risk and not discoverable before Linda levee failed. (See RT 3991:9-3992:14 [Respondents' expert witness admits that studies and standards to evaluate soils for hydro-consolidation were unavailable until the 1990s]; and see Section II (C)(2)(a) of the State's Respondent's Brief.)

B. THE STATEMENT OF DECISION SUPPORTS THE STATE'S THEORY OF CAUSATION

The trial judge considered the two causation theories, rejected the Respondents' theory that Linda levee's construction caused seepage failure, and accepted the hydro-consolidation process as the cause of failure. Two successive paragraphs of the Statement of Decision quoted below, only one of which the court below emphasizes, show that although Linda levee's construction rendered it *susceptible* to seepage, those conditions did not cause the failure.

“One of plaintiff's experts, Meehan, characterized the levee as an inferior, high-risk levee which was poorly constructed and didn't meet any engineering standards that existed any time during its life; it was built on a very unstable foundation which was subject to severe seepage pressure and offered little resistance to seepage over the course of its history; the embankment was composed of loose, sandy material and its composition and construction were not adequate. *This is an indictment which the evidence supports. (Emphasis in original; SO at 11-12.)*

Nevertheless, the cause of the failure of this levee is found to be that which was stated at the outset of this discussion: an interaction of the physical properties of natural elements: soil and water.” (*Emphasis Added; Id.*)

The above successive paragraphs taken from the trial court's findings must be read together, given their plain meaning, and liberally construed to support the judgment. (See *Johndrow, supra*, 31 Cal.2d at 208-209.) The court below discusses only the first paragraph, a finding that the

levee embankment and foundation were poorly constructed and offered little resistance to seepage over the course of the levee's history. (*Emphasis Added*; SO at 11-12.) Other than quoting the second paragraph, the court below ignores it and its clear relationship to the emphasized paragraph.

The second quoted paragraph begins with “[n]evertheless”. The ordinary meaning of “nevertheless” is “in spite of that” or “notwithstanding”. (See Webster's Third New International Dictionary-Unabridged (Merriam-Webster 2002).) By “nevertheless”, the trial court was clear: in spite of Linda levee's construction, and the risk of instability and seepage arising from it, something else caused the failure.

Having rejected one of the two causes of failure presented, the trial court identified the actual cause of failure as that which was stated at the outset of its discussion, an interaction of the physical properties of natural elements: soil and water”. (AA 327; Para. 3; SO at 12.) The referenced “discussion” is given below.

“the physical process implicated in the failure of the levee was one in which water from the water side of the levee seeped through the levee's foundation (the ground upon which the levee's embankment was constructed) and so eroded it as to permit the levee's embankment (the portion of the earthen structure which was constructed above the foundation) to collapse into the weakened foundation thereby creating an opening in the embankment through which flood waters flooded. The precise physical phenomena which accompanied the process were described in considerable detail by well-informed and credible experts whose accounts and opinions varied in some details but were fairly consistent in advancing the general proposition that seepage, attributable to the natural physical properties of the elements implicated in the process-soil and water-produced the failure.

It is likely that the process of seepage and erosion of the foundation was one which had been underway during high water events in the decades preceding the failure (e.g. in 1955

and 1964) and culminated in collapse on that occasion **because the degree of erosion produced during the event of February 1986, when added to that produced during such events in the preceding decades, resulted in a foundation critically impaired.**" (*Emphasis Added*; SO at 11.)

By the first quoted paragraph above, the trial court found that floodwater seeped through the levee's foundation and eroded it. The emphasized portion of the second paragraph above describes the physical process of hydro-consolidation and distinguishes it from "seepage"

Hydro-consolidation changed Linda levee's foundation by creating open conduits that do not close when flood waters recede. (RT 8754:18-8757:4; 8959:8-8960:5; 8971:2-8974:1; 9053:1-13.) Unlike seepage, where flood waters must force their way through the same soil material during each flood event, the small conduits created by hydro-consolidation progressively extended closer to the levee's landward side with each flood event. (See AA 326, Para. 2; RT 8756:9-8757:4; 8798:18-8800:1; 8822:22-8824:10; 8923:19-8924:2; 8969:4-11; 8972:19-8973:19; 9057:23-9058:13.) This cumulative interaction of soil and water allowed floodwaters to begin to flow without soil resistance toward the levee's landward side beginning from where they stopped in the levee's foundation when floodwaters receded in the preceding flood event. (*Id.*)

The trial court's finding that hydro-consolidation caused the levee failure is further supported by a paragraph of the Statement of Decision emphasized by the court below stating, in part, that "the decision to select the course selected was made by [Yuba County] before [defendants] had any involvement with the levee and cannot be said to represent a plan adopted by either of them." (SO 14.) When the entire paragraph taken from

the Statement of Decision is read, however, it supports the State's causation theory.

“Moreover, the plan of design and construction of Morrison Grade, out of which Linda levee evolved, was one adopted by the Board of Supervisors of Yuba County **and if that plan were a substantial cause of the levee's failure by reason of its specification of siting, construction materials or construction techniques**, such a circumstance would not engage the liability of the State or R.D. 784.” (*Emphasis Added*; SO 12.)

The generally accepted meaning of “moreover” is “in addition”. (See Webster's Third New International Dictionary-Unabridged (Merriam-Webster 2002).) Use of “moreover” demonstrates that what follows is supplemental to other exonerating circumstances. That other exonerating circumstance is the trial court's finding that Linda levee's design and construction did not cause it to fail.

The above passage includes a factual finding that Linda levee's location and construction arose from Yuba County's specifications. By including the phrase “and if that plan [Yuba County's plan] were a substantial cause of the levee's failure”, the trial court confirms that it made no finding that the seepage failure potential arising from Linda levee's design and construction caused the failure.

Finally, the trial court's finding that hydro-consolidation and not Linda levee's susceptibility to seepage caused the failure is supported by the levee's capable performance during all floods to which was subjected between its original construction in 1905 and its failure. (AA 314.) Although the court below praised the levee's success in carrying flood waters, the court below dismisses the levee's performance as fortuitous. (SO 41, 43.) Indeed, the trial court made no finding that Linda levee suffered damage, distress or seepage before it failed in 1986. If the levee's

design and construction caused its failure, then seepage, damage or other signs of levee distress would have manifested and been reported before 1986.

Deference must to be given on review to the trial judge's findings of fact. This Court should grant review to secure uniformity of decisions among the reviewing courts and prevent a miscarriage of justice.

III.

CONCLUSION

The State respectfully contends that significant and outcome-determinative errors are inherent in the analysis given in the decision below. More important than the miscarriage of justice it creates is the precedent it would set in contravention of *Belair* and *Bunch*. This Court should intervene by granting review.

Dated: December 31, 2003

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CERTIFICATE OF COMPLIANCE PURSUANT
TO CAL. R. CT. 14(c)(1)

Pursuant to California Rule of Court 14(c)(1) that allows the State of California to file a petition not exceeding 14,000 words, and in reliance upon the word count feature of the software used, the State of California certifies that the attached Petition for Review by State of California contains 6,706 words, exclusive of those materials not required to be counted under Rule 14(c)(3).

STERLING A. SMITH

DECLARATION OF SERVICE

Case Name: ***Coordination Proceeding Special Title (Rule 1550(b)):
February 20, 1986 Flood Cases***
Court: **Court of Appeal, Third Appellate District**
Case No. **3 Civil C040553**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 2, 2004, I served the attached

PETITION FOR REVIEW

by placing it in the internal mail collection system at the Office of the Attorney General, 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage fully postpaid, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on January 2, 2004 at Sacramento, California.

CARRIE SCHAUFEL

SERVICE LIST

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